

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3942 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.THAKKER

and

Hon'ble MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
5. Whether it is to be circulated to the Civil Judge? : NO

CHEMSTAR ORGANICS (INDIA) LTD

Versus

UNION OF INDIA

Appearance:

M/S TRIVEDI & GUPTA for Petitioners

MR PB MAJMUDAR for Respondent No. 1

MR MUKESH R SHAH for Respondent No. 2, 3

CORAM : MR.JUSTICE C.K.THAKKER and

MR.JUSTICE C.K.BUCH

Date of decision: 30/07/1999

ORAL JUDGEMENT [PER: C.K.THAKKAR,J]

Rule. Mr. PB Majmudar appears and waives service for Respondent no.1 and Mr. MR Shah appears and waives service of Rule for Respondent Nos. 2 & 3. In the facts and circumstances of the case, the matter is taken up for

final hearing today.

This petition is filed against Stay Order No. 351 of 1999 decided on 4th May, 1999 by the Commissioner (Appeals), Vadodara.

Being aggrieved by the Order-in-Original passed by the authority, the petitioner abovenamed has preferred an appeal which is pending before the appellate authority for final hearing. Along with the appeal, an application for stay was made. Appellate Authority, after considering the facts and circumstances of the case, did not think it fit to grant interim relief and observed as under :-

" I have carefully gone through the records of the case and considered the submissions made by the appellants. In the instant case the product Para-Chloro Benzyl Cyanide has not been used in the manufacture of goods falling under sub-heading No. 3808.10 for which they claimed exemption from the payment of duty under Notification No. 43/88-CE dtd 1.3.88 amended by the notification No. 34/91-CE dtd; 25.7.91. As per the provisions of Notification No. 34/91-CE dtd. 25.7.91 the appellants were required to follow the procedure set out in Chapter X of the CE & Salt Act, 1944. Further the appellant also failed to claim the exemption for captive consumption under Notification No. 217/86 in the Classification List filed under Rule 173B of the CE Rules, 1944.

Thus the appellants have contravened the provisions of Notification No. 34/91 dtd. 25.7.91 in as much as they failed to follow the procedure laid down under chapter X of CE Rules, 1944. They have also suppressed the fact regarding declaration of the product for clearance without payment of duty in their Classification List filed under Rule 173B of the CE Rules, 1944. Thus, it is clear that they have availed the exemption without fulfilling the conditions of Notification No. 217/86 therefore they were not entitled to clear the above product without payment of duty.

Considering the facts and circumstance of the case it appears that the appellant have wilfully availed the exemption on the product which was required to be cleared on payment of duty from their factory. I therefore find that prima-facie there does not appear to be any

ground for full waiver of duty/penalty and therefore the appellants are directed to deposit in cash Rs.4,50,000/ as a pre-deposit under Sec.35F of the CE Act,1944 within two weeks from the date of receipt of this order and report compliance within three weeks, failing which this appeal is liable to be dismissed. On compliance, there shall be stay and waiver of the pre-deposit of the remaining amount of duty/penalty till final disposal of appeal.

The stay application in the subject appeal is accordingly disposed off as per the direction of Hon'ble High Court of Gujarat."

Several contentions were raised on behalf of the petitioner before us. It was submitted that the authority has committed an error of law in passing order-in-original. If the petitioner was entitled to relief on the basis of any of the notifications, namely Notification No.34 of 1991 or No.217 of 1986, such a benefit ought to have been extended and that it was obligatory on the part of the authority to grant such benefit. In that connection, reliance was placed on various decisions including decisions in Simla Agencies v/s Collector of Customs, 1993(67) ELT 599 and GSFC Ltd. v/s Collector of Central Excise, 1996(83) ELT 153. It was also submitted that such a point can be permitted to be raised even at an appellate stage. Obviously, therefore, there is an error apparent on the face of record committed by the appellate authority in not considering the point when stay application was decided.

It was also contended that notice issued by the authority was time barred. It was a relevant consideration and since it goes to the root of the matter, it ought to have been discussed while disposing of stay application. Finally, it was submitted that though the petitioner company was in financial constraint and though the said fact was brought to the notice of the appellate authority and even reflected in the submissions made by the learned counsel for the petitioner, while disposing of stay application, there is no whisper about the financial condition of the applicant company and entire amount of Rs. 4.50 lacs was ordered to be

deposited failing which appeal will stand dismissed for non-prosecution.

So far as merits are concerned, learned counsel for the respondent submitted that the matter is pending before the appellate authority. According to him, it was

not a case of claiming of relief but was a case in which initially relief was granted under one head which was obtained by the petitioner and thereafter when it came to the notice of the authority that the unit was not entitled to the said benefit, notice to recover amount was issued. In these circumstances, principles laid down in the decisions cited before the appellate authority as well as before us would not apply.

Since appeal is pending, in our opinion, it would not be appropriate and desirable to express any opinion on the contentions on merits at this stage. In the facts and circumstances, however, it cannot be said that by not considering merits at this stage, any error of law apparent on the face of record is committed by the appellate authority.

So far as contention of financial hardship is concerned, in our opinion, the submission appears to be well-founded. A specific plea was raised by the petitioner that the petitioner was in financially hardpressed. There is no finding that the averment made or submission put forward by the petitioner was incorrect. The appellate authority, however, while disposing stay application, did not deal with said aspect. In the facts and circumstances of the case, therefore, it would be proper that instead of remanding the matter on that question, if we direct the petitioner to deposit 50% of the amount i.e. Rs. 2.25 lacs from the total amount of Rs. 4.50 lacs as pre-deposit. Said amount will be deposited within four weeks from the receipt of writ. Appellate authority will not dismiss the appeal if said amount is deposited within the stipulated period. If amount will not be deposited, it would be open to the authority to pass an appropriate order. Deposit will be made either in cash or in any permissible mode in accordance with law.

Rule is made absolute to the aforesaid extent. No order as to costs.

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